No. 06-6407

Supreme Court, U.S.
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In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) require deference to the state court's determination that Panetti is competent to be executed – and thereby statutorily preclude Panetti's request for federal habeas relief?

2. Does the Eighth Amendment prohibit execution of a validly convicted capital murderer who, despite his mental illness, knows that he committed capital murder and has been found as a factual matter to have the capacity to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death?

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STATEMENT OF THE CASE

A. The Crime

Scott Louis Panetti has led a troubled and violent life. Between 1981 and 1992, Panetti was hospitalized on multiple occasions and variously diagnosed with substance abuse and dependence, personality disorders, depression, chronic undifferentiated schizophrenia, and schizoaffective disorder. JA 339-41;[1] Federal Petition for Writ of Habeas Corpus, No. 1:99-CV-00260 (W.D. Tex. Sept. 7, 1999) (hereinafter "Federal Petition") (Ex. 14). Although his doctors initially treated him only with therapy, they later placed him on medication, which proved effective in controlling his mental illness. *Id.*, at 462-63 (noting in 1986 that, while taking medication, Panetti "shows no evidence of thought disorder" and "was not paranoid in his attitude"), 466 (observing in 1990 that, after Panetti was stabilized on his medication, he displayed no evidence of "any delusions or any psychotic thinking, or any suicidal or homicidal ideations").

Panetti married his second wife, Sonja, in 1988, and they had a daughter the following year. 31.RR.61. In August 1992, Sonja separated from Panetti because of his drinking and physical threats. 31.RR.62. She took their daughter, then three years old, to live with her parents, Amanda and Joe Alvarado. 31.RR.60-61. Panetti later called to threaten Sonja and his in-laws, saying he would kill both her and the Alvarados or burn down their house. 31.RR.64. On September 2, 1992, in response to these threats, Sonja obtained a protective order against Panetti. 31.RR.65-66; 41.RR (SX 91).

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[1] Citations to the transcript of Panetti's capital-murder trial are noted as "RR" ("Reporter's Record"). Citations to the State's exhibits admitted into evidence during those proceedings are noted as "SX" ("State Exhibit"). Citations to the pleadings, orders, and motions filed in the trial court are noted as "CR" ("Clerk's Record"). Citations to the federal district court's hearing on execution competence are noted as "FH" ("Federal Hearing"). Citations to the joint appendix filed in this Court are noted as "JA."

Six days later, Panetti awoke before dawn, 33.RR.695, shaved his head, 31.RR.95-96, and dressed himself in camouflage, 33.RR.679. Arming himself with a rifle, a sawed-off shotgun, 33.RR.696, and several knives, 33.RR.706-07, Panetti drove to the Alvarados' house, 33.RR.696. When he arrived, Panetti broke his shotgun trying to shatter a sliding glass door near Sonja's bed. 31.RR.69; 33.RR.717. He chased Sonja out of the house and confronted her in the front yard, 33.RR.704, hitting her face with the butt of his rifle, 31.RR.73.

Although Sonja managed to retreat into the house and lock the front door, Panetti shot the lock off and cornered Joe and Amanda Alvarado in the kitchen. 31.RR.42-43; 33.RR.705. He asked Sonja, who was standing in the adjoining hallway, who she would like to see die first. 31.RR.84. Using his rifle, Panetti then shot and killed Joe Alvarado. 31.RR.84. Sonja begged Panetti not to kill her mother, 31.RR.91, but Panetti pressed the rifle against Amanda Alvarado's chest and pulled the trigger, 32.RR.417-18, killing her and spraying Sonja and their daughter with blood, 31.RR.91. Then his rifle jammed. 31.RR.92.

Panetti grabbed Sonja and their daughter and walked them out to his Jeep. 31.RR.92-93. He drove them back to his bunkhouse, 31.RR.94, where he had them wash off the blood, 31.RR.96. When Sonja asked if she could go check on her parents, he responded: "I just shot your parents. No more mommy, no more daddy; get that through your head." 31.RR.96-97. He then forced Sonja to read the protective order aloud. 31.RR.97-98. Sonja asked Panetti if he planned to shoot her and her daughter. 31.RR.98. He replied that he had not yet decided. 31.RR.98.

At dawn, Panetti allowed both Sonja and their daughter to leave the bunkhouse, telling Sonja that he planned to stay there and "shoot two or three policemen" before taking his own life. 31.RR.101. Panetti surrendered to police that afternoon. 31.RR.241. Later the same day, Panetti confessed to the murders, recounting the details of the crime to police. 33.RR.692-737. When asked if he

thought that his mental condition excused his behavior, Panetti replied, "it doesn't excuse me from any of that. You know, I made my bed and I'm going to lie in it. . . . I f***ed up. I feel a lot of remorse." 33.RR.734-35; see also JA 208.

Dr. Michael Lennhoff, a psychiatrist, interviewed Panetti several times at the local jail. Panetti stated that he had followed his drug regimen over the preceding year, but he later confessed that he had not taken his medication for one week before the murders. Federal Petition Ex. 14, at 431, 436. Although Dr. Lennhoff noted that Panetti exhibited genuine mental illness, he also concluded that "Panetti may have wanted to impress me with how mentally disturbed he is, perhaps in an exaggerated way." *Id.*, at 434. After a later meeting, Dr. Lennhoff felt that Panetti was "still trying to impress me as not having committed a deliberate crime." *Id.*, at 436.

B. Panetti's Exhaustively Affirmed Conviction and Sentence and the Rejection of His Alleged Incompetence to Stand Trial and to Waive Counsel

Panetti was charged with capital murder. 1.CR.8. The trial court appointed Dr. E. Lee Simes, a psychiatrist, to evaluate Panetti's competence for trial. JA 9. Dr. Simes noted that, despite Panetti's delusional thinking, "his overall story was quite consistent and insightful." JA 13. In particular, Dr. Simes observed that Panetti understood why he was facing capital-murder charges, the significance of those charges, and the significance of the punishment he might receive. JA 13. Panetti also displayed ability to process questions and information and to assist in his defense. JA 13. Dr. Simes concluded that Panetti was competent to stand trial. JA 13.

In April 1994, Panetti moved for a competence hearing. 2.CR.236-41. In the first trial-competence hearing, the jury deadlocked at four for incompetent, three for competent, and five undecided. 3.CR.295-96; 10.RR.379.[2] At the

[2] Panetti incorrectly reports the final vote as nine-to-three in favor of incompetence. Panetti Br. 8, n.6. That vote occurred earlier in the deliberations. 3.CR.290.

second trial-competence hearing, the jury found Panetti competent to stand trial. 13.RR.206-07.

Eight months later, Panetti sent the trial judge a letter explaining that he had stopped taking all medication and, as a result, was "restored to sanity"; he had dismissed his attorneys; he felt competent to represent himself; he did not intend to "act like a lawyer" in his trial; and he would be able to prove that he was insane at the time of the murders. 3.CR.360. Panetti's attorneys then moved to withdraw as his counsel. 3.CR.363-64.

The trial court called a pretrial hearing to inquire further into Panetti's expressed desire to represent himself. 15.RR.5. The judge told Panetti that he personally did not want Panetti to represent himself, 15.RR.10, and asked Panetti's attorneys to confer privately with Panetti about waiving counsel, 15.RR.11. After this consultation, Panetti's attorneys reported that they did not think Panetti should represent himself, but that was his "clear intent." 15.RR.12-13. Panetti confirmed that he wanted to represent himself because he had the right to do so under Texas law and the United States Constitution, and that he was "fully aware" of the penalty for the charges against him. 15.RR.18. Panetti then executed a voluntary waiver of counsel. 3.CR.369. The district attorney informed the court that, because the State was "concerned about protecting the Defendant's rights," he did not want Panetti's attorneys to withdraw. 15.RR.24. When the court reexamined Panetti about his decision, Panetti replied, "I understand everything that's been going on today, sir. I do, however, feel a little bit insulted that I have been asked the same question so many times, Your Honor." 15.RR.25-28. The court held that Panetti had voluntarily and intelligently exercised his right to represent himself and then appointed standby counsel for Panetti. 15.RR.29-30.

At trial, Panetti entered a plea of not guilty by reason of insanity. 31.RR.24. In his rambling opening statement, Panetti informed the jury that he had been diagnosed with paranoid schizophrenia and manic depression in 1986, and that he believed only an insane person could prove the

insanity defense. 31.RR.28-29. As Panetti explains in his brief, he exhibited bizarre and incoherent behavior throughout his trial. Panetti Br. 11-15. He did call as witnesses two psychiatrists who had previously treated him, 38.RR.1567-1616, and endeavored to establish through one that, when he did not take his medication, his mental illness could prevent him from distinguishing right and wrong, 38.RR.1574-75. The jury nonetheless found Panetti guilty of capital murder and sentenced him to death. 7.CR.1041-44; 38.RR.1685; 39.RR.102. The Texas Court of Criminal Appeals (CCA) affirmed Panetti's conviction and sentence, *Panetti* v. *Texas*, No. 72,230 (Tex. Crim. App. Dec. 3, 1997) (unpublished), and the Court denied certiorari, 525 U.S. 848 (1998) (Mem.).

Panetti then filed a state habeas petition raising fourteen claims, including whether he was competent to stand trial and competent to waive counsel. State Petition for Writ of Habeas Corpus, No. 3310-A, at 3-4 (Tex. Crim. App. June 19, 1997). The CCA denied relief. *Ex parte Panetti*, No. 37,145-01 (Tex. Crim. App. May 20, 1998) (*per curiam*) (unpublished). Panetti next filed a federal habeas petition, asserting the same fourteen claims that he had alleged in his state habeas petition. See JA 355. The district court denied this petition, *Panetti* v. *Johnson*, No. 99-CV-260 (W.D. Tex. Mar. 9, 2001), but granted a certificate of appealability on, *inter alia*, whether Panetti was competent to stand trial and competent to waive counsel, *Panetti* v. *Johnson*, No. 99-CV-260 (W.D. Tex. June 3, 2001). The court of appeals denied habeas relief, *Panetti* v. *Cockrell*, 73 Fed. Appx. 78 (CA5 2003) (unpublished), and the Court again denied certiorari, *Panetti* v. *Dretke*, 540 U.S. 1052 (2003) (Mem.).

In sum, one jury and four courts rejected Panetti's trial-incompetence claim; one court found him competent to waive counsel and four courts rejected his collateral challenge to that determination; and another jury and two courts rejected his insanity defense. No judge or jury has ever found him incompetent.

C. Panetti's Efforts to Prove Incompetence To Be Executed in State and Federal Court

Once an execution date was set, Panetti filed a motion in the state trial court under Texas Code of Criminal Procedure Article 46.05 asserting incompetence to be executed. JA 355. After concluding that Panetti had failed to make a substantial showing of incompetence, the state court denied his Article 46.05 motion, JA 355, and the CCA dismissed his appeal, *Ex parte Panetti*, No. 74,868 (Tex. Crim. App. Jan. 28, 2004) (*per curiam*) (unpublished).

Panetti then filed a habeas petition in federal district court, asserting that *Ford* v. *Wainwright*, 477 U.S. 399 (1986), prohibited his execution. JA 355-56. The district court granted a stay of execution and allowed Panetti an opportunity to present his renewed allegations to the state trial court. JA 357.

In response to Panetti's second Article 46.05 motion, the state court appointed two neutral experts, Dr. George Parker and Dr. Mary Anderson, to assess Panetti's competence to be executed. JA 59. After conducting a joint interview of Panetti, Drs. Parker and Anderson filed a report documenting their observations and conclusions. JA 70-76. This report reflects Panetti's hostility to Drs. Parker's and Anderson's questions, his tendency toward religious conversation, his attempted manipulation of the interview process, and his general refusal to cooperate with the court-appointed experts. JA 70-73, 75.

Because of Panetti's refusal to cooperate, Drs. Parker and Anderson also relied on several sources of collateral data – including prison records; letters that Panetti had recently written to friends and family; court documents, including documents relating to other competence determinations; discussions with prison staff; and another expert evaluation of Panetti – to help form their relevant opinions. JA 73-75. Based on these data and their personal observations, Drs. Parker and Anderson concluded that Panetti (1) "knows that he is to be executed, and that his execution will result in his death" and (2) "has the ability to understand the reason he is to be executed." JA 75.

In response, Panetti filed a detailed submission criticizing Drs. Parker and Anderson's methodology and contrasting their conclusions with those in a psychiatric evaluation that Panetti had previously presented to the court. JA 79-98. After considering that submission, the state court again denied relief under Article 46.05. JA 99.

Panetti then sought habeas relief in the federal district court, JA 375, which concluded that the state court's determination of Panetti's competence to be executed was not entitled to AEDPA deference because Panetti allegedly failed to receive constitutionally sufficient process, JA 359-61. After granting Panetti's motions for appointment of counsel, discovery, and funds for expert and investigative assistance, JA 358, the district court held an evidentiary hearing on competence, JA 362.

At the hearing, Panetti presented expert testimony from Dr. Mary Alice Conroy, a psychology professor, JA 136; Dr. Susan Rosin, a psychologist, JA 198; Dr. Seth Silverman, a forensic psychiatrist, JA 219; and Dr. Mark Cunningham, a clinical and forensic psychologist, JA 323. The State presented expert testimony from Dr. Parker and Dr. Anderson – the neutral experts that the state trial court had appointed – and lay testimony from Steve Miller, Major of Correctional Officers for the prison in which Panetti is incarcerated, JA 275-76; Terri Hill, a Texas Department of Criminal Justice (TDCJ) Lieutenant assigned to Panetti's housing area, 1 FH 192; and Victoria Williams, a TDCJ security officer who frequently conversed with Panetti, 1 FH 199.

All of the expert witnesses agreed that Panetti suffers from some degree of mental illness. Although some of the experts labeled this illness schizophrenia or schizoaffective disorder, *e.g.*, JA 144-45, 205, they were collectively unable to agree on a single diagnosis, see JA 239, 313.[3]

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[3] Dr. Conroy noted that "the major portion of our population in our inpatient units in federal Bureau of Prisons hospitals are diagnosed with some form of schizophrenia," JA 142, and Dr. Silverman opined that most schizophrenics are competent to be executed, JA 227.

The experts did agree, however, that Panetti has the capacity to – and does, in fact – understand that he will be executed. JA 147-48, 207, 236, 243, 245.[4]

Further expert testimony established Panetti's specific understanding that he committed the murders. Indeed, Dr. Rosin testified that Panetti recounted details of his activity on the day of the murders and expressed sorrow for having committed the crime. JA 208; see also JA 148-49 (Dr. Conroy's testimony that Panetti believed that God had forgiven him for killing the Alvarados and had "wiped the slate clean"). Dr. Silverman testified to uncertainty about whether Panetti knows that he killed the Alvarados, but only because Panetti steadfastly refused to answer his questions on this topic. JA 221.

Several experts also concluded that Panetti's delusions created a false sense of the true reason for his execution. *E.g.*, JA 149, 156, 202, 209 (testimony from Drs. Conroy and Rosin that Panetti believes his execution was ordered to prevent him from preaching the Gospel). Importantly, however, these same experts testified that Panetti understands that the State's stated reason for his execution is punishment for capital murder. JA 157, 214.

Dr. Parker testified that portions of Panetti's responses to the experts' execution-competence examinations could be attributed to malingering, see JA 241-43; see also, *e.g.*, JA 174, 177, 181 (noting additional reports of Panetti's suspected malingering in the past), and Drs. Parker and Anderson each specifically testified that Panetti has

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[4] Lay testimony corroborated this point. Major Miller testified that Panetti cooperated with him in going over the State's pre-execution forms, JA 281, II-42-53, and demonstrated his understanding of the forms' questions about disposition of assets, choice of last meal, and the like. JA 287-88. Additional lay testimony reflected Panetti's demonstrated ability to communicate coherently – and politely – with prison staff. *E.g.*, 1 FH 193-96 (testimony of Terri Hill); 1 FH 200 (testimony of Victoria Williams).

the capacity to understand the reason for his execution, JA 245, 247, 303-04. Both Dr. Parker and Dr. Anderson emphasized that Panetti was deliberately manipulative and uncooperative during his interview with them. JA 239-40, 244-46, 271, 300, 303, 312-14; accord JA 75. They based their ultimate conclusions on Panetti's overall cognitive functionality, as demonstrated through letters he wrote to friends and family, his logical responses to interview questions, and his ability to understand such things as history and movies. JA 242-43, 302-04.

Dr. Parker's suspicions of malingering were corroborated by evidence of psychiatric evaluations conducted in the two years following Panetti's capital trial. For example, Dr. Michael Gilhousen noted that loosening of Panetti's thought processes "appeared to be intentional on his part to create the impression of mental illness." JA 167, II-30. After another interview, Dr. Gilhousen described Panetti's behavior as "obviously manipulative and theatrical." JA 171-72, II-20. Another doctor expressed the belief that Panetti's switching among different voices was "contrived . . . to impress us or lead us to believe that he did have alter personalities." JA 170, II-41.

After hearing all the evidence, the federal district court made three factual findings. First, based on the experts' agreement, the court concluded that Panetti is aware that he will be executed. JA 372.

Second, the district court found that Panetti is aware that he committed both murders. JA 372. The court based this conclusion on Dr. Conroy's and Dr. Rosin's testimony that Panetti knows that he murdered the Alvarados. JA 372. Although the court recognized that Dr. Silverman's testimony cast doubt on this conclusion, the court discounted that testimony, noting that it was based on Panetti's limited responses during his interview with Dr. Silverman. JA 372.

Third, the district court found that Panetti understands the State's stated reason for execution. JA 372. The court based this finding on the testimony of Drs.

Conroy and Rosin, and discounted Dr. Silverman's contrary testimony for the same reason. JA 372-73.

Additionally, the district court recounted Dr. Parker's and Dr. Anderson's assessments that "some portion of Panetti's behavior could be attributed to malingering," and it expressly concluded that, although all of the experts had agreed Panetti had "some degree" of mental illness, their testimony collectively "casts doubt on the extent of Panetti's mental illness and symptoms." JA 363.

Finally, the district court noted Dr. Cunningham's testimony that "suggests" that Panetti's delusions prevent him from understanding that Texas is a lawfully constituted authority and lead him to believe that the State "is in league with the forces of evil that have conspired against him," and it observed that this testimony was consistent with the testimony of Panetti's other experts. JA 373. The court made no finding, however, whether these delusions were genuine or the partial product of malingering, because the court deemed it irrelevant to the question of whether Panetti "knows the reason for his execution" within the meaning of the court of appeals's execution-competence test. JA 373.

Based on these factual findings, the district court concluded that Panetti is competent to be executed. JA 373. Although the court denied Panetti's habeas petition, it stayed his execution pending appeal, JA 373, and granted a certificate of appealability, *Panetti* v. *Dretke*, No. 04-CA-042 (W.D. Tex. Nov. 4, 2004). The court of appeals affirmed the district court's denial of habeas relief, *Panetti* v. *Dretke*, 448 F.3d 815 (CA5 2006); JA 374-84, and the Court granted certiorari, JA 387.

SUMMARY OF THE ARGUMENT

In devoting fully half of his brief to his statement of the case, Panetti endeavors to focus the Court's attention on his lengthy mental-health history, explaining that "incompetency runs like a fissure through every proceeding in this case." Panetti Br. 6. But that fissure has been mostly sealed once and for all by the conclusive determinations of state

and federal courts repeatedly rejecting Panetti's direct and collateral challenges to adverse rulings on his insanity defense, his competence to stand trial, and his competence to waive counsel. For that reason, Panetti correctly concedes that, as a matter of law, he is now presumed competent to be executed. *Ibid.*

The state court, the district court, and the court of appeals have all concluded that Panetti has failed to overcome that presumption. The district court found as a factual matter that Panetti knows that he murdered the Alvarados, that he will be executed, and that the State's stated reason for executing him is that he committed two murders. Panetti has not challenged those factual findings on appeal.

Distilled to its core, Panetti's case does not turn on the weighing of his mental-health history or a reconsideration of his capital trial, but rather on the resolution of two purely legal issues: (1) whether the state court's determination of execution competence was entitled to AEDPA deference; and (2) whether the Eighth Amendment requires a capital convict to have a "rational understanding" of the reason for his execution.

Panetti virtually ignores the first question, but it alone is dispositive. His sole argument against AEDPA deference is that the state court's competence ruling violated his procedural-due-process rights under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), because the court did not conduct a full evidentiary hearing or appoint a psychiatric expert to submit evidence on his behalf. But *Ford* does not extend any such guarantee, requiring only an opportunity to be heard and an impartial tribunal – both of which Panetti received. Because the state-court procedures were adequate under *Ford*, the AEDPA statutorily bars Panetti's request for habeas relief.

Even if AEDPA deference were not due the state court's findings, the Court still should affirm the court of appeals's judgment that Panetti is competent to be executed. There is no disputing that, under *Ford*, it violates the Eighth Amendment to execute the insane. The only

merits question here is what is the proper standard for measuring "insanity." The court of appeals correctly rejected Panetti's claim that the proper standard is whether a defendant "rationally understands" the reason for his capital sentence. Although the Court has not yet resolved this question, its approach to Eighth Amendment questions leaves no doubt that "rational understanding" is not the constitutional threshold of execution competence.

The Court's usual empirical bases for evaluating the constitutionality of punishments – eighteenth-century practice and modern state legislation – do not settle the issue. The vague standards for execution competence that courts applied at the time of the Bill of Rights, when today's diagnostic methods were unknown, do not translate into any definitive level of understanding that the Court could identify as the constitutional minimum. And because only half of the death-penalty States have any statutory definition of execution competence – and even those States diverge in their definitions – there is no consensus in contemporary values on this point.

The Court is left, then, to exercise its own independent judgment in defining the level of mental incapacity that renders death a constitutionally impermissible penalty. Both Panetti's and his *amici*'s proposed standards, which require that a convict "rationally understand" the reasons for his execution, are fundamentally flawed. Given the inherent subjectivity and manipulability of such a standard, capital murderers could as a routine matter claim a lack of "rational understanding" through malingering or refusing to cooperate with experts. Moreover, such a requirement – imported from the Court's Fifth and Sixth Amendment jurisprudence concerning defendants' strategic participation at the guilt and sentencing phases – is out of place at the moment of execution. Finally, the retributive and deterrent interests served by the death penalty – focused primarily as they are on society at large rather than the capital murderer – do not demand the "rational understanding" that Panetti urges.

The Court should instead adopt a clear and objective test for execution competence. Specifically, the Court should hold that a mentally ill capital convict is incompetent to be executed only if, because of his illness, he lacks the *capacity* to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death. This standard controls for the malingering or uncooperative convict, is appropriately tailored to the execution stage of capital proceedings, and serves the twin goals of retribution and deterrence that justify capital punishment. Applying this standard, the Court should hold that Panetti is competent to be executed.

ARGUMENT

I. The State Court's Determination That Panetti Is Competent To Be Executed Is Entitled to AEDPA Deference.

Contrary to the district court's conclusion, JA 359-61, the state court's adjudication of Panetti's competence claim, JA 99-100, is entitled to deference under the AEDPA because it was neither contrary to, nor involved an unreasonable application of, clearly established federal due-process law as set out by this Court in *Ford*. This deference provides an alternative basis on which the Court should affirm the court of appeals's judgment that Panetti is not entitled to federal habeas relief.[5] See JA 376 & n.1.

Like Panetti's claim, the execution-competence claim in *Ford* arose from a federal habeas appeal. 477 U.S., at 404-05. Under the federal habeas statute in effect at the time, deference was afforded to factual determinations made by the state court unless the petitioner established one of the enumerated exceptions, one of which was whether the state proceedings provided a "full and fair hearing." 477 U.S., at 411 (plurality op.); *id.*, at 423

[5] The State raised the AEDPA-deference issue in the district court, JA 359, the court of appeals, JA 376, and in its brief in opposition to certiorari in this Court, Br. Opp. Cert. 7-9.

(Powell, J., concurring in the judgment); see also 28 U.S.C. §2254(d)(2) (1984). Ultimately, a majority of the Court concluded that deference was not appropriate because the state procedure for determining execution competence was found to be inadequate. *Ford*, 477 U.S., at 416 (plurality op.); *id.*, at 423 (Powell, J., concurring in the judgment).

The federal habeas statute has been amended since *Ford* was decided. Under the AEDPA, a federal habeas writ "shall not be granted" with respect to a state-court judgment unless that adjudication:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d).

As a statutory matter, the AEDPA – unlike the prior version of §2254(d) – contains no requirement of a "full and fair hearing" before deference is required. See *Valdez* v. *Cockrell*, 274 F.3d 941, 946 (CA5 2001); JA 376, n.1. Nevertheless, because it believed that *Ford* required, as a *constitutional* matter, a full evidentiary hearing in state court, the district court appears to have held §2254(d) of the AEDPA to be unconstitutional as applied in this case.[6] JA 130-33, 361. That holding was in error.

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[6] The district court's reasoning on this question is somewhat oblique and is potentially subject to an alternative interpretation, which Panetti advances, Panetti Br. 4, n.3, that the court merely found the state court's failure to conduct a full evidentiary hearing to be "an unreasonable application of . . . clearly established federal law" under §2254(d). Either way, the district court's failure to accord AEDPA deference to the state court's competence finding was erroneous for the same reason – that *Ford* compels no such conclusion.

A. *Ford* Requires Only Minimal Process for Deference To Be Afforded to the State Court's Competence Determination.

Echoing the district court's analysis, JA 359-61, Panetti's sole argument that AEDPA deference does not apply is that the state court disregarded *Ford*'s holding establishing the minimum procedural due process requirements in assessing execution competence, Panetti Br. 4, n.3.[7] Because the state court's procedures fully comported with the minimum protections outlined in *Ford*, its judgment was entitled to statutory deference.

In concluding that the state competence determination in *Ford* was not entitled to deference, the Court established that the Constitution guarantees certain due-process rights to habeas petitioners challenging their competence to be executed. 477 U.S., at 411-16 (plurality op.); *id.*, at 423-27 (Powell, J., concurring in the judgment). But because no majority of the *Ford* Court agreed on what

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[7] Panetti does not raise an AEDPA challenge to the state court's application of the legal standard for execution competence, and with good reason: there was (and is) no "clearly established federal law as determined by the Supreme Court of the United States" on that point. Justice Powell noted in his *Ford* concurrence that the plurality opinion did not address the "meaning of insanity." 477 U.S., at 418 (Powell, J., concurring in the judgment). Later, Justice Marshall, the author of the *Ford* plurality opinion, confirmed that *Ford* did not establish a test for execution competence. *Rector* v. *Bryant*, 501 U.S. 1239, 1241 (1991) (Marshall, J., dissenting from denial of cert.). Although the Court has subsequently acknowledged Justice Powell's proffered test as the appropriate standard in dicta, see *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989), that reference does not constitute "clearly established law" under the AEDPA. See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) ("That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.").

And to the extent that the state court's competence ruling encompasses factual determinations, Panetti likewise does not raise an AEDPA challenge to the reasonableness of those determinations under §2254(d)(2). Accordingly, those facts must be presumed correct. 28 U.S.C. §2254(e)(1).

specific type or amount of process is due, Justice Powell's opinion concurring in the judgment – the opinion that states the narrowest ground for the Court's due-process holding – controls. *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

Justice Powell rejected any notion that a full-scale "sanity trial" was constitutionally required:

> "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have *substantial leeway* to determine what process best balances the various interests at stake." *Ford*, 477 U.S., at 427 (Powell, J., concurring in the judgment) (emphasis added).

Thus, as long as at least this level of process was provided, former §2254(d)'s presumption of correctness applied. And given the "substantial leeway" that state courts are expressly given under *Ford*, the AEDPA today requires even greater deference to the state court's case-by-case application of it. *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway [under the AEDPA that] courts have in reaching outcomes in case-by-case determinations.").

B. The State Court's Procedures Easily Satisfied *Ford*'s Minimal Due-Process Requirements.

The *Ford* plurality identified three principal failings with Florida's procedure: (1) that it denied the prisoner the opportunity be heard – specifically an opportunity to submit "any material relevant to the ultimate decision;" (2) that it denied the prisoner "any opportunity to challenge or impeach the state-appointed psychiatrists;" and (3) that it placed the decision "wholly within the executive branch." *Ford*, 477 U.S., at 413-16 (plurality op.). Once those three failings are corrected, the plurality was

explicit: "We do *not here suggest that only a full trial on the issue of sanity will suffice* to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.*, at 416 (plurality op.) (emphasis added). And Justice Powell's controlling concurrence was even more emphatic, expressly noting that state procedures "*far less formal* than a trial" would suffice. *Id.*, at 427 (Powell, J., concurring in the judgment) (emphasis added).

The procedures employed by the state court satisfy all three requirements of *Ford*. First, unlike Ford – who was not "included in the truth seeking process," *id.*, at 413 (plurality op.) – Panetti was provided with ample opportunity to be heard. Florida prohibited consideration of any materials submitted by Ford, *ibid.*; Panetti, in contrast, was statutorily entitled to submit any "affidavits, records, or other evidence" supporting his allegation of incompetence, Tex. Code Crim. Proc. art. 46.05(c); JA 59, and he did in fact submit such materials, JA 102, 108-12.

Second, unlike Ford – who was denied "any opportunity to challenge or impeach the state-appointed psychiatrists," *Ford*, 477 U.S., at 415 (plurality op.) – Panetti was expressly invited by the Court to submit any objections or challenges to the court-appointed psychiatrists, JA 77-78, and he did in fact submit such objections and challenges, JA 79-98.

Third, and most importantly, unlike Ford – whose competence proceedings were "wholly within the executive branch," *Ford*, 477 U.S., at 416 (plurality op.) – Panetti had his competence challenge adjudicated by an impartial court of law. Tex. Code Crim. Proc. art. 46.05(b). This is in stark contrast to *Ford*, which considered the executive-branch nature of the proceedings to be "[p]erhaps the most striking defect in the [Florida] procedures." 477 U.S., at 416 (plurality op.); see also *id.*, at 427 (Powell, J., concurring in the judgment).

Nonetheless, Panetti complains that the state court denied his requests for "adversarial proceedings by which he could contest the court-appointed experts' opinions."

Panetti Br. 4, n.3. But nothing in Justice Powell's controlling *Ford* concurrence suggests that a live adversarial hearing is necessary to satisfy due-process requirements in this context. Indeed, Justice Powell expressly observed to the contrary that "ordinary procedures – complete with live testimony, cross-examination, and oral argument by counsel – are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." *Ford*, 477 U.S., at 426 (Powell, J., concurring in the judgment).

Additionally, Panetti argues that the state court erroneously decided his competence claim without appointing a psychiatric expert for him. Panetti Br. 4-5, n.3. This argument is likewise unavailing. Although Justice Powell's opinion stated that due process requires that the court *accept* any evidence from petitioner's counsel, "including psychiatric evidence that may differ from the State's own psychiatric examination," see *Ford*, 477 U.S., at 427 (Powell, J., concurring in the judgment), nothing in *Ford* gave Panetti a constitutional right to the appointment of his own expert at state expense. And, unlike in *Ford*, neither Dr. Parker nor Dr. Anderson was *the State's* expert. Rather, each was a neutral mental-health expert appointed by the state court. JA 59-60; see Tex. Code Crim. Proc. art. 46.05(f).

In any event, Panetti did in fact submit his own expert psychiatric evidence to the state court. Specifically, Panetti presented the report of Dr. Mark Cunningham in his second motion to determine competence under Texas Code of Criminal Procedure Article 46.05, JA 102, 108-10, which in turn prompted the state court to appoint its own experts to evaluate Panetti, JA 59. After Drs. Parker and Anderson submitted their report, the court invited Panetti to respond. JA 77-78. In his detailed submission, JA 79-98, Panetti relied on the Cunningham report to challenge Drs. Parker and Anderson's conclusions, JA 94-95.

Under any measure, the state-court proceedings satisfied the strictures of *Ford*. Therefore, §2254(d), as applied, is not unconstitutional. And because the procedures were consistent with *Ford*, the state court's

adjudication likewise did not contradict or unreasonably apply "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d). Accordingly, the state court's determination that Panetti is competent to be executed statutorily bars his request for federal habeas relief.

II. Even If AEDPA Deference Does Not Apply, Panetti's Execution Does Not Violate the Eighth Amendment.

Only if the Court concludes that the AEDPA does not bar habeas review should it reach Panetti's claim that the court of appeals employed the wrong legal standard for execution competence. Although *Ford* held that the Eighth Amendment proscribes execution of the "insane," 477 U.S., at 409-10, the Court did not define "insanity" or otherwise delineate the constitutional threshold of competence to be executed, *id.*, at 418 (Powell, J., concurring in the judgment), a question which remains unresolved.

Before turning to the merits of that claim, two issues bear emphasis. **First**, there is no dispute that, under *Ford*, executing the insane violates the Eighth Amendment. Executing the insane was forbidden at common law, and it is forbidden today. Although Panetti and his *amici* endeavor to frame this case as the final and most important installment in the soon-to-be *Atkins-Roper* trilogy, that book has already been written – in *Ford*. And **second**, there is no dispute that, like many capital defendants, Panetti suffers from some degree of mental illness. Panetti devotes considerable energy to demonstrating this undisputed fact, while never confronting the fact findings made by the state and federal district courts and the unbroken line of judicial determinations of his competence.

The only legal question before the Court on the merits of this case is what is the definition of "insanity" – that is, what must a court find to conclude that a capital murderer is constitutionally incompetent to be executed.

In determining whether the Eighth Amendment bars a particular punishment as "cruel and unusual," the Court has followed a well-established analytical path. First, the Court examines whether the punishment was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791. *Ford*, 477 U.S., at 405; see also *Solem* v. *Helm*, 463 U.S. 277, 285-86 (1983). Second, the Court considers whether the punishment is deemed cruel and unusual according to modern "standards of decency." *Roper* v. *Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality op.)). Those standards derive principally from "objective evidence of contemporary values," the "clearest and most reliable" of which is "the legislation enacted by the country's legislatures." *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002) (citation and quotation marks omitted). Finally, the Court applies its "independent judgment" to evaluate "the acceptability of a particular punishment under the Eighth Amendment." *Roper*, 543 U.S., at 563-64. In capital cases, the Court has made this assessment primarily by reference to "the penological justifications for the death penalty." See *id.*, at 571; *Atkins*, 536 U.S., at 317.

This three-part analysis does not support Panetti's contention that, under the Eighth Amendment, a capital convict must "rationally understand" the reasons for his execution before it may proceed. Although execution of the "insane" was deemed cruel and unusual in 1791, *Ford*, 477 U.S., at 406-08, the common law did not then draw fine distinctions in mental ability, and thus did not delineate any precise competence standard. Consequently, the standards of the common law are, at best, inconclusive. Likewise, a survey of modern state legislation offers indefinite guidance, as it yields no consensus at all on the mental faculty a capital murderer must possess at the time of his execution. Finally, in the exercise of its independent judgment, the Court should reject the proposition that a capital convict must possess a "rational understanding" of the reasons for his execution to render death an acceptable punishment under the Eighth Amendment.

Such a standard is not tailored to the particular interests at stake in the post-sentencing phase of capital proceedings, invites malingering and abuse, and is not necessary to advance the retributive and deterrent justifications for the death penalty.

For all of these reasons, the Court should reject Panetti's and his *amici*'s proposed execution-competence standards. It should instead hold that a mentally ill capital convict is incompetent to be executed only if, because of his illness, he lacks the *capacity* to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death. Under this standard, Panetti is competent to be executed.

A. The General Rule Against Executing the Insane in 1791 Does Not Illuminate the Specific Level of Understanding That Defines the Eighth Amendment Floor.

"[T]he Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791. *Id.*, at 405. It is now settled that this category included execution of the "insane." *Id.*, at 406-08. Thus, the relevant historical inquiry is what degree of mental incapacity qualified as "insanity" and triggered the ban, or, conversely, what level of understanding a capital convict then had to possess to be eligible for execution.

As *amici* Legal Historians explain, the law of that time "reveals no precise definitions or uniform standards used . . . to determine mental competency." Legal Historians Br. 4. For that reason, *no* contemporary competence metric defined as a specific consciousness level – including the court of appeals's "awareness" standard *and* Panetti's proposed "rational understanding" test – can claim any eighteenth-century pedigree. Because the Court's task here *is* to prescribe the grade of understanding that marks the constitutional threshold, the historical prong of the Eighth Amendment inquiry is ultimately unhelpful.

Nevertheless, the historians believe that they can divine enough of the ancient meaning of insanity to conclude that a court in the Framers' era would have spared Panetti from his sentence. Panetti and the historians also infer from rationales for the ban on executing the insane that it protected all who did not "rationally understand" the reasons for their execution. The Court should reject this speculation. Whether Panetti's delusional behavior would have earned him a reprieve from execution in 1791 is, at best, indeterminate. And whatever one may infer in hindsight from commentators' justifications for insulating the "insane" from capital punishment, such inferences still do not confirm any discernible scale of mental awareness that eighteenth-century judges and juries actually applied in assessing execution competence.

1. Eighteenth-century courts did not employ a competence standard that corresponds to any particular level of understanding defined today.

The State agrees with *amici* Legal Historians that the Eighth Amendment incorporates "at least those protections from punishment the common law afforded English subjects" at the time it was adopted, Legal Historians Br. 7, and thus that late eighteenth-century English precedents and practice are the primary sources of information about the Amendment's original scope. The State further agrees that these sources "did not bequeath definitive standards to determine competence for execution." *Id.*, at 21.[8]

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[8] Indeed, this was true of competence at any stage of criminal proceedings, as "there were simply no clear, accessible definitions of derangement judges could include in their instructions to a jury that might indicate what 'threshold level' might preclude criminal responsibility." Joel Peter Eigen, Witnessing Insanity: Madness and Mad Doctors in the English Court 38 (1995); see also Joel Peter Eigen, Unconscious Crime: Mental Absence and Criminal Responsibility in Victorian London 24 (2003).

To the extent the common law did draw any distinctions in competence levels for criminal proceedings, it was only between "total insanity" and "partial insanity." Only the former provided a basis for acquittal or a reprieve from execution. Eigen, Unconscious Crime, *supra*, at 40 (noting that, prior to 1800, "criminal law recognized only a *total* want of understanding and memory – *a total insanity* – as grounds for acquittal"); 1 Matthew Hale, The History of the Pleas of the Crown 30 (1736) (observing that "partial insanity seems not to excuse them in the committing of any offence for its matter capital"). Even then, Hale acknowledged that "it is very difficult to define the indivisible line that divides perfect and partial sanity" and explained that ultimately the judge and jury must make that determination based on the particular circumstances of the case. 1 Hale, *supra*, at 30; see also 4 William Blackstone, Commentaries on the Laws of England 25 (1st English ed. 1769) ("But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury.").

In this endeavor, courts of that era could not avail themselves of "the sophisticated and intricate diagnostic tools and categories developed by modern psychiatry." Legal Historians Br. 16. Indeed, doctors seldom even participated in competence assessments. Eigen, Witnessing Insanity, *supra*, at 42 (noting that "medical men were *rarely* present [in criminal proceedings] throughout the late 1700s"). "Usually it was not medical evidence but the testimony of relatives, friends, or spectators that persuaded the court that the defendant had been mad . . . ." Nigel Walker, The Insanity Defense Before 1800, 477 Annals Am. Acad. Pol. & Soc. Sci. 25, 30 (1985).

Given the indefinite insanity criteria of eighteenth-century English practice, the historians urge that the relatively strict competence standard applied by the court of appeals – requiring that Panetti simply be "aware" of his impending execution and the State's reasons for it – finds no support in the common law in 1791. Legal Historians Br. 19. That may well be the case.

But for the very same reason that the court of appeals's "awareness" test was unknown in 1791, so too was Panetti's proposed "rational understanding" test. Just as English courts "did not draw the fine lines the Fifth Circuit did," *ibid.*, neither did they draw the equally-specific line that Panetti proposes. The vague formulations employed by eighteenth-century courts, lacking a clear taxonomy and uninformed by expert analysis, do not translate to *any* of the specific competence standards known to modern jurisprudence. Consequently, this first stage of the Eighth Amendment inquiry does not define the threshold level of execution competence.

2. The Court should reject *amici* Legal Historians' speculation that Panetti would not have been executed under eighteenth-century standards.

Although the historians acknowledge that the Framers would have found their era's competence standards "imprecise or even amorphous," they nonetheless conclude that "the law as generally understood then would not have allowed the execution of a mentally ill and delusional defendant like Mr. Panetti." Legal Historians Br. 22. This assertion appears to rest on two interpretations they suggest concerning the eighteenth-century standard for execution competence: (1) that it was more lenient than the standard for trial fitness; and (2) that it approximated the understanding of a fourteen-year-old child. *Id.*, at 14-16, 18-19. Neither proffered interpretation is well founded.

a. The standard for execution competence in 1791 was not discernibly lower than that for competence to stand trial.

Because the common law dictated that a person could be adjudged insane and spared execution even when he had previously been found competent to stand trial, the historians deduce that either (1) the common law accounted for

mental deterioration between conviction and execution or (2) execution competence was a lower standard than trial fitness. *Id.*, at 14-15. They settle on the latter explanation, *id.*, at 15, but for dubious reasons.

First, the historians speculate that it would have been uncommon for a convict's mental state to deteriorate during the relatively short interval between conviction and execution. However infrequent, though, such lapses – rather than application of a lower competence standard – were in fact the explicit basis of the common-law rule allowing reassessment of sanity before execution: "[I]f, *after judgment, he becomes of nonsane memory*, execution shall be stayed." 4 Blackstone, *supra*, at 24 (emphasis added); see also 1 Hale, *supra*, at 35 (same). Second, the historians note that it was within the discretion of the court or king to assess a convict's execution competence. Legal Historians Br. 15. Even so, Blackstone and Hale agree that the assessment itself was generally left to a jury, 4 Blackstone, *supra*, at 25; 1 Hale, *supra*, at 35, and they do not suggest that jurors used any different test for insanity in this regard. Third, the historians reason that an execution reprieve, which could be temporary, logically demanded a lower standard than did a trial, in which "resolution of the defendant's criminal responsibility" was at stake. Legal Historians Br. 15. That supposition has no eighteenth-century basis and ignores the strong interest in carrying out a valid sentence.

In any event, the historians' interpretation is refuted by the plain text of Hale's and Blackstone's lengthy discourses on the law of insanity, neither of which draws any distinction at all between the standards for trial fitness and execution competence. 1 Hale, *supra*, at 35 (explaining that "if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried . . . or, if after judgment he becomes of *non sane memory*, his execution shall be spared"); 4 Blackstone, *supra*, at 388-89 (applying term *non compos* to describe basis for exempting defendant from further proceedings at *all* stages of capital cases). Surely if execution competence required a different

test, these venerable authorities would have noted it in these pertinent sections of their texts.

b. Hale's fourteen-year-old standard provides no basis to conclude that a court would have stayed Panetti's execution in 1791.

Relying on Hale and other commentators, the historians also argue that "the level of understanding required to meet the more forgiving standard of fitness for execution was at least that of a child less than 14 years old." Legal Historians Br. 19.[9] Conceding that this test is "indefinite," they nonetheless argue that "it does not support the Fifth Circuit's approach." *Ibid.* But as with other competence definitions of the time, it is too vague to support *any* particular metric of understanding.

First, one can only speculate how the Framers would have ranked the mental capacity of a fourteen-year-old. But more importantly, Hale's age-based criterion was not the definitive eighteenth-century standard. Blackstone, writing in 1769, observed that the legal capacity of children themselves no longer hewed strictly to age groupings in capital cases. 4 Blackstone, *supra*, at 23 ("[T]he capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen . . ."). He then describes the execution of several children between ages eight and thirteen under this standard. *Id.*, at 23-24.

And to the extent that Hale's formulation still had any currency in 1791, the historians admit that its application

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[9] The historians' implications that Hale's 14-year-old standard was specifically tailored for "fitness for execution" and was somehow "more forgiving" than the competence test applied at other stages are incorrect. Hale expressly discussed this standard as applying to all phases of capital proceedings. 1 Hale, *supra*, at 30.

"appears, if anything, to have been *more indefinite*." Legal Historians Br. 19 (emphasis added). Consequently, the fourteen-year-old standard is of negligible utility in assessing whether an eighteenth-century judge or jury would have found Panetti competent to be executed.

c. Panetti's claimed delusional behavior would not necessarily have exempted him from execution in 1791.

It is at the very least doubtful whether the specific mental infirmity at the heart of Panetti's claim – his delusion of religious persecution, Panetti Br. 28 – would have earned him a reprieve from execution in 1791. As one commentator notes, "delusions" were not introduced as an insanity defense until the trial of James Hadfield for the attempted assassination of King George III in 1800, nine years after the Eighth Amendment's adoption. Eigen, Witnessing Insanity, *supra*, at 49-51. And even Hadfield's acquittal "did not inaugurate delusion's 'career' as a regular feature of the insanity defense." *Id.*, at 51. Indeed, "[i]t was another twelve years before delusion was introduced into testimony at the Old Bailey by a medical witness." *Ibid.*

Another commentator confirms that Hale's "perfect insanity" and fourteen-year-old measures did not encompass delusional behavior as we understand it today:

> "In the time of this eminent jurist insanity was a much less frequent disease than it now is, and the popular notions concerning it were derived from the observation of those wretched inmates of the mad-houses . . . . Those nice shades of the disease, in which the mind, without being wholly driven from its propriety, pertinaciously clings to some absurd delusion, were either regarded as something very different from real madness, or were too few, too far removed from the common gaze, and too soon converted by bad management into the more active forms of the disease to enter much into the general idea

> entertained of madness." Isaac Ray, A Treatise on the Medical Jurisprudence of Insanity 21 (1962).

Accordingly, although eighteenth-century precedents may yield limited examples of persons adjudged "insane" who exhibited delusional behavior, the relevant commentaries call into question the notion that such persons would generally have been spared from capital sentences.

3. The Court cannot reliably derive the precise scope of the ban on executing the insane in 1791 from rationales advanced to justify the ban.

The Legal Historians invite the Court to divine the precise level of understanding contemplated by the eighteenth-century ban on executing the "insane" by drawing inferences from various suggested rationales for the prohibition. Legal Historians Br. 22; see also Panetti Br. 37-40. Such an approach is fraught with uncertainty, particularly when the rationales "do not provide a common answer." *Ford*, 477 U.S., at 419 (Powell, J., concurring in the judgment).

If the contours of the ban hinged on the ability of the convict to seek clemency or on the inhumanity of executing the severely mentally ill, one has to question the extent to which those reasons actually influenced the administration of capital punishment by courts that also sentenced eight- and ten-year-old children to be hanged. See 4 Blackstone, *supra*, at 23-24. If the prohibition reflected the view that mental illness is its own punishment, see *id.*, at 389, the application would have depended entirely on the jury's assessment of whether the convict's particular illness was a sufficient penalty for his capital crime. If the idea was to spare those who could not prepare for their deaths, Justice Powell believed that to be satisfied so long as the defendant is "aware that his death is approaching," *Ford*, 477 U.S., at 422 (Powell, J., concurring in the judgment), which Panetti has been found to be, JA 372.

And although some believed that execution of the insane would not deter sane persons, others at the time clearly disagreed.[10]

B. Contemporary State Legislation Does Not Yield a National Consensus on the Threshold Level of Execution Competence.

In addition to forbidding punishment that was considered cruel and unusual in 1791, the Eighth Amendment also prohibits modes of punishment that are inconsistent with "evolving standards of decency that mark the progress of a maturing society." *Ford*, 477 U.S., at 406 (citation omitted). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S., at 312 (citation omitted). A survey of this legislation does not support Panetti's claim that a national consensus places the threshold of execution competence at "rational understanding." Panetti Br. 40. Rather, it reveals that no discernible consensus currently exists on this question.

As Panetti notes, of the thirty-eight States that authorize capital punishment, half do not have *any* statutory definition of execution competence. *Ibid.* By itself, this statistic undermines the notion that there is any sort of national "standard" on the requisite level of understanding. Because those States' citizens have yet to weigh in on this issue, it is impossible to know how they would define competence in this context.[11]

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[10] Compare Edward Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes 6 (1797) (citing lack of deterrent effect), with John Hawles, Remarks on the Trial of Charles Bateman 476, in 11 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors (1811) (disagreeing with Coke because "the terror to the living is equal, whether the person [executed] be mad or in his senses").

[11] Panetti rightly does not suggest that the lack of a death-penalty statute in the remaining twelve States bears in any way on whether a

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Furthermore, the state legislatures that *have* addressed the issue do not agree upon a standard. Texas classifies as incompetent for execution a convict who "does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed." Tex. Code Crim. Proc. art. 46.05(h). But this statute does not require the "rational understanding" that Panetti urges, and indeed, Panetti was adjudged competent to be executed under Article 46.05. JA 99. Four other States mimic the court of appeals's test, requiring only that the convict be "aware" that he will be put to death for a capital crime.[12]

The remaining fourteen States define execution competence in terms of the convict's *capacity* to understand or know his sentence and the reasons for it.[13] Like

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consensus exists for purposes of execution competence. Although the *Roper* Court found it appropriate to count those States in tallying the jurisdictions that barred execution of juvenile offenders, 543 U.S., at 574, the present analysis demands a different calculus. Although a State's wholesale rejection of the death penalty may subsume its view as to *whether* a particular category of offenders may be executed, it does not speak to the distinct issue of *when* a person presumed competent and eligible for his capital sentence may nonetheless be deemed incompetent to proceed with the execution. See *Ford*, 477 U.S., at 425 (Powell, J., concurring in the judgment) (noting that in execution-competence context, "the only question raised is not *whether*, but *when*, [the] execution may take place").

[12] Ariz. Rev. Stat. Ann. §13-4021(B); Colo. Rev. Stat. §18-1.3-1401(2); Md. Code Ann., Corr. Servs. §3-904(a)(2); Utah Code Ann. §77-19-201. Panetti mistakenly omits Utah from this group. Panetti Br. 40-41 & n.25. Panetti also incorrectly posits that these statutes "implicitly" embrace what Panetti inaccurately labels a "rational understanding" requirement. *Ibid.*; see *infra* Part II.C.2. The word "awareness" alone certainly does not imply the robust appreciation that Panetti mislabels "rational understanding."

[13] Florida, Idaho, Missouri, Montana, New York, Ohio, and Wyoming use the words "capacity" or "capable." Fla. Stat. §922.07(3); Idaho Code Ann. §18-210; Mo. Ann. Stat. §552.060(1); Mont. Code Ann. §46-14-103; N.Y. Correct. Law §656(1); Ohio Rev. Code Ann. §2949.28(A); Wyo. Stat. Ann. §7-13-901(a)(v). Georgia, Kentucky, North Carolina, and Oregon use the term "ability." Ga. Code Ann. §17-10-60; Ky. Rev. Stat. Ann.

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Texas's statute, most of these provisions are ambiguous with respect to the type of "understanding" that is the focus of the capacity inquiry. Only four contain language that arguably requires, or has been interpreted to require, the "rational understanding" showing that Panetti proposes.[14] Georgia directs that the convict be able "to know" why he is being executed and the nature of the punishment, Ga. Code Ann. §17-10-60, which implies simply an awareness of the reasons for his impending death. The other nine use the term "understand" without qualification,[15] leaving it unclear whether those statutes require for competence to be executed "factual understanding" or "rational understanding" – a distinction that has been a feature of competence-to-stand-trial jurisprudence at least

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§431.213; N.C. Gen. Stat. §15A-1001; Or. Rev. Stat. §137.463(6)(a). Arkansas and Louisiana use "competence" to understand. Ark. Code Ann. §16-90-506(d)(1)(B); La. Rev. Stat. Ann. §15:567.1(B). Finally, Mississippi uses the phrase "sufficient intelligence." Miss. Code Ann. §99-19-57(2)(b). As the district court observed, assessing a convict's *capacity* to understand is not the same as assessing whether he in fact actually understands. JA 364-65; see *infra* Part II.C.3.

[14] See *Provenzano* v. *State*, 750 So. 2d 597, 602 (Fla. 1999) (*per curiam*) (holding that Florida's execution-competence provision "contains a rationality element, albeit a limited one"); *Billiot* v. *State*, 655 So. 2d 1, 15 (Miss. 1995) (suggesting that Mississippi's execution-competence statute contemplates whether the convict has "a rational understanding of what it means to be executed" and "the ability to rationally connect his crime with the fact that he will be executed"); N.C. Gen. Stat. §15A-1001 (requiring as element of competence for any punishment that convict be able "to comprehend his own situation in reference to the proceedings"); Or. Rev. Stat. §137.463(6)(a) (requiring that capital convict be "able to comprehend the reasons for the sentence of death and its implications").

[15] Ark. Code Ann. §16-90-506(d)(1)(B); Idaho Code Ann. §18-210; Ky. Rev. Stat. Ann. §431.213; La. Rev. Stat. Ann. §15:567.1(B); Mo. Ann. Stat. §552.060(1); Mont. Code Ann. §46-14-103; N.Y. Correct. Law §656(1); Ohio Rev. Code Ann. §2949.28(A); Wyo. Stat. Ann. §7-13-901(a)(v).

since the Court handed down *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (*per curiam*).[16]

Thus, the States whose legislatures have defined execution competence make up a fractured lot. Although a majority emphasizes the convict's capacity, neither a majority view, nor even a clear plurality view, emerges about what level of understanding a capital murderer must have the capacity to possess. Even the fourteen States that look to convicts' capacity still represent only 37 percent of the jurisdictions that authorize capital punishment. And of those fourteen, only four arguably embrace some form of what Panetti would term "rational understanding," and even they focus on capacity, rather than an actual demonstration of specific understanding. Those four jurisdictions constitute only 10.5 percent of death-penalty States, far less than a consensus by any measure. Indeed, an equal number adopt a variant of the court of appeals's "awareness" test that Panetti challenges. Thus, at least at the current time, the varied approaches of the several state legislatures yield no objective consensus from which the Court can divine any national standard reflecting contemporary values on execution competence.[17]

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[16] Panetti includes in his accounting judicial decisions from five States with no statutory definition of execution competence. Panetti Br. 41-42 & n.30. The Court should reject this attempted expansion of the Eighth Amendment inquiry for two reasons. First, because the point of this survey is to assess "contemporary values," the Court has focused principally on "the legislation enacted by the country's legislatures," *Atkins*, 536 U.S., at 312 (citation omitted), which presumably reflects the mores of the electorate. By contrast, judicial opinions cannot claim the same representative quality. Second, only three of these decisions purport to express *state* law, and they each differ in substance. *Bingham* v. *State*, 169 P.2d 311, 314 (Okla. Crim. App. 1946); *Singleton* v. *State*, 437 S.E.2d 53, 58 (S.C. 1993); *Van Tran* v. *State*, 6 S.W.3d 257, 265-66 (Tenn. 1999). The remaining two address the federal constitutional standard. *Baird* v. *State*, 833 N.E.2d 28, 29 (Ind. 2005); *Commonwealth* v. *Jermyn*, 652 A.2d 821, 822 (Pa. 1995).

[17] Panetti further relies on professional opinion to support his view that "rational understanding" should be the constitutional standard. Panetti Br. 42-43. This reliance is misplaced. In *Atkins*, the Court

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C. The Court Should Hold That the Appropriate Constitutional Standard for Competence To Be Executed Is Whether a Defendant Has the Capacity To Recognize That His Punishment Is the Result of His Being Convicted of Capital Murder and Will Cause His Death.

Because the foregoing historical and contemporary surveys yield no clear standard for execution competence under the Eighth Amendment, the Court's typical past practice would be to apply its "own independent judgment" to define the level of mental incapacity that renders death a constitutionally impermissible penalty. See *Roper*, 543 U.S., at 564. Both Panetti's and his *amici*'s proposed execution-competence standards are deeply flawed. The State urges the Court to reject those proposals and instead adopt a clearer and more objective test. Specifically, the Court should hold that a mentally ill capital convict is incompetent to be executed only if, because of his illness, he lacks the *capacity* to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death.

The State's proposed standard – derived from *Ford* and the Court's Eighth Amendment jurisprudence – prevents the execution of the truly incompetent, while at the same time (1) incorporating essential safeguards

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looked to professional opinion, religious opinion, international consensus, and polling data only *after* it had found a state-law consensus against executing the mentally retarded. See 536 U.S., at 316, n.21.

Even if there were such a consensus, the additional evidence that Panetti cites is sparse in comparison to that adduced in *Atkins*. Cf. *ibid.* Panetti, for example, proffers no evidence of any international consensus, perhaps because no other country has yet addressed the specific question before the Court. And when the United Nations addressed the question, it declined to opine at all as to the substantive standard that should be employed. See Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, Supp. No. 1, at 33, U.N. Doc. E/1984/92 (1984) (setting a prohibition on execution of "persons who have become insane" but not defining insanity).

against malingering and noncooperation with psychological examiners, (2) being specifically tailored to the post-sentencing phase of capital proceedings, and (3) effectively advancing the modern penological interests behind the death penalty.

1. Because of the inherent uncertainties and subjectivity of psychiatric testing, and the risks of malingering and abuse, any standard for competence to be executed should be rigorous and clear.

Panetti and his *amici* endeavor to frame this case as a natural extension of *Atkins* and *Roper*. But mental illness differs from mental retardation and age in several material respects. Unlike age and mental retardation, severe mental illness is (1) subject to conflicting diagnoses, (2) given to subjectivity, (3) mutable over time, and (4) in some instances, within the ability of the individual to ameliorate or exacerbate, by voluntarily taking – or ceasing to take – medications that may help control the illness. Each of these distinctions renders incompetence to be executed far more susceptible to malingering or abuse than is either age or mental retardation.

The Court has often noted the difficulties that attend even the most skilled psychiatric diagnoses. "[P]sychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms." *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985). For that reason, "a particularly acute need for guarding against error inheres in a determination that 'in the present state of the mental sciences is at best a hazardous guess however conscientious.'" *Ford*, 477 U.S., at 412 (plurality op.) (quoting *Solesbee* v. *Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)). As Justice Powell explained,

> "Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. And unlike a determination of whether the death penalty is appropriate in a

> particular case, the competency determination depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'" *Id.*, at 426 (Powell, J., concurring in the judgment) (quoting *Addington* v. *Texas*, 441 U.S. 418, 430 (1979)) (citations omitted).

Just last Term, the Court observed that the medical definitions of mental illness "are subject to flux and disagreement," and that such diagnoses "may mask vigorous debate within the profession about the very contours of the mental disease itself." *Clark* v. *Arizona*, 126 S.Ct. 2709, 2722, 2734 (2006). "[T]he consequence of this professional ferment," the Court noted, "is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct." *Id.*, at 2734.

Not only are psychiatric diagnoses subjective and frequently conflicting, they are by their nature subject to change. *Atkins* and *Roper* were predicated on constant variables: if a defendant is fifteen or seventeen or twenty at the time of the crime, that age at that instant is fixed and unchanging; likewise, if an individual is of normal intelligence throughout his or her life, that person cannot be expected later to become mentally retarded. In contrast, if a person is sane yesterday and today, that does not mean he or she will be sane tomorrow.

As Justice O'Connor cautioned in *Ford*, that mutability carries with it serious risks of malingering:

> "[T]he *potential for false claims and deliberate delay* in this context is *obviously enormous*. This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary." 477 U.S., at 429 (O'Connor, J., concurring in part

and dissenting in part) (citations omitted) (first two emphases added).[18]

Finally, unlike with age or retardation, capital murderers facing execution may have some ability to voluntarily choose to render themselves incompetent to be executed simply by ceasing to take their medication. Indeed, in the case at bar, the evidence indicates that Panetti's medication had been largely successful in controlling his mental illness, Federal Petition Ex. 14, at 462-63, but that he willingly chose to stop taking it, *id.*, at 431, 436; 3.CR.360.

2. Panetti's proposed "rational understanding" standard has no basis in the Court's precedent and would invite abuse.

The Court has recognized that "a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies." *Drope*, 420 U.S., at 176. Accordingly, legal competence evaluations must be specifically tailored to the stage of proceedings at which they apply. See *Rees* v. *Peyton*, 384 U.S. 312, 314 (1966) (*per curiam*).

As Justice Powell accurately noted in *Ford*, an "Eighth Amendment [incompetence to be executed] claim can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death." 477 U.S., at 425 (Powell, J., concurring in the judgment). Thus, the relevant inquiry is merely *when*, and not *whether*, a valid death sentence may be carried out. *Id.*, at 425 & n.5; see Panetti Br. 47 (recognizing that "an offender's execution can proceed if he regains his sanity"). Because the "rational understanding" test that Panetti and the APA urge addresses concerns that are absent in the post-sentencing

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[18] In so noting, Justice O'Connor echoed the concerns of Hale, who, some three centuries earlier, likewise urged courts to guard against the potential for "great fraud" concerning those claiming incompetence. 1 Hale, *supra*, at 35; Legal Historians Br. 15, n.8.

phase of capital proceedings, the Court should decline to adopt it.

a. A "rational understanding" inquiry would engraft Fifth and Sixth Amendment concerns on an Eighth Amendment test.

Although Panetti uses the phrase loosely, "rational understanding" is a specific term of art; it describes the core of several pre-sentencing competence tests. "Rational understanding" was introduced in *Dusky*, in which the Court defined the test for competence to stand trial as whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." 362 U.S., at 402 (quotation marks omitted); see also *Godinez* v. *Moran*, 509 U.S. 389, 398 (1993) (concluding that the "rational understanding" test should also be used to measure a defendant's competence to plead guilty and to waive the right to counsel).

In explaining the "rational-understanding" component of pre-sentencing competence determinations, the *Godinez* Court emphasized the "strategic choices" that criminal defendants must be capable of making for a court to find them competent to relinquish such significant trial rights as the Fifth Amendment's privilege against self-incrimination and the Sixth Amendment's rights to jury trial and confrontation of adverse witnesses. *Ibid.*; see *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). The Court went on to note additional strategic choices, including "whether (and how) to put on a defense and whether to raise one or more affirmative defenses," that a defendant who pleads not guilty will be called upon to make during the course of trial. *Godinez*, 509 U.S., at 398.

For all of these strategic choices, a "rational understanding" is necessary to ensure that defendants do not foolishly or mistakenly relinquish valuable constitutional rights. A defendant faced with such choices must be able to

"understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope*, 420 U.S., at 171.

But a capital convict, unlike a capital defendant, has substantially fewer rights, and there are no significant strategic choices left for him to make. See *Herrera* v. *Collins*, 506 U.S. 390, 399 (1993) (explaining that the presumption of innocence disappears after conviction and listing numerous constitutional rights that defendants enjoy but that convicts do not); *Barefoot* v. *Estelle*, 463 U.S. 880, 887-88 (1983) (discussing the "secondary and limited" nature of federal habeas proceedings); see also *Ford*, 477 U.S., at 421 (Powell, J., concurring in the judgment) (noting that, because the Court's "decisions already recognize . . . that a defendant must be competent to stand trial, . . . the notion that a defendant must be able to assist in his defense is largely provided for"). Assuming that a convict is competent to be executed, only the remote possibilities of clemency or commutation – processes that call for no significant strategic decisions by a convict – can prevent the sentence from being carried out.

b. Panetti's conception of "rational understanding" is far too expansive.

Panetti's argument is, in fact, even more aggressive than one for inclusion of only a pure "rational understanding" component. Although he invokes that phrase throughout his brief, the substantive requirement that Panetti asks the Court to incorporate is actually a version of the heightened "knowing and voluntary" requirement that the Court has held applicable, over and above the "rational understanding" competence component, with respect to a defendant's decision to plead guilty or to waive his right to counsel. *Godinez*, 509 U.S., at 400-01 & n.12; *Faretta* v. *California*, 422 U.S. 806, 835 (1975).

As *Godinez* explained, "knowing and voluntary" is not part of any competence test; it is an additional safeguard designed to ensure not merely that a defendant has the *capacity* to understand trial proceedings, but rather that

he "*actually does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." 509 U.S., at 401, n.12 (emphasis added).

The heightened level of cognizance embodied in the "knowing and voluntary" standard lies at the heart of the test that Panetti and his *amici* ask the Court to adopt. See, *e.g.*, Panetti Br. 37, 45 (asserting that, before execution, a convict should be able to "prepare himself for death as expiation for his offense" and "suffer the anguish of realizing that he is being put to death for what he did" (quotation marks omitted)); APA Br. 17 (proposing a test that would require capital convicts to have "more than a shallow understanding of why they are being executed"); ABA Br. 5-6 (urging that convicts must have a "meaningful" or "deeper" understanding of their fates).

The true substance of Panetti's proposed test is thus even less supportable than an accurately labeled "rational understanding" test would be. Even putting aside concerns about vagueness, requiring a "deep" or "meaningful" appreciation of the State's reasons for imposing the death penalty would create an even greater risk that the Court's test could be circumvented through malingering or abuse. See *supra* Part II.C.1. These same concerns would apply at the competence-to-stand-trial stage – which explains, in part, why the mere *capacity* to have a "rational understanding" of the proceedings, rather than actual demonstration of the "deeper" type of understanding embodied in the "knowing and voluntary" requirement, is all that competence test requires. *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Dusky*, 362 U.S., at 402).[19]

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[19] By contrast, use of the "knowing and voluntary" inquiry in the specific contexts of competence to plead guilty or to waive the right to counsel presents no such risk because malingering or noncooperation would only *frustrate*, rather than facilitate, a defendant's expressed intention to waive those rights.

When viewed in light of the overall death-row population, Panetti's proposal is especially problematic. As a matter of common understanding, most individuals who commit heinous murders are, almost by definition, not entirely sane. Although estimates vary, some sources indicate that as many as 70 percent of death-row inmates suffer from some form of schizophrenia or psychosis. Nancy S. Horton, Restoration of Competency for Execution: Furiosus Solo Furore Punitur, 44 Sw. L.J. 1191, 1204 (1990) (citing Amnesty International, United States of America: the Death Penalty 108-09 (1987)); see JA 142 (expert testimony that most of the convicts in federal Bureau of Prisons hospitals are schizophrenic). Many, if not most, schizophrenics exhibit the type of delusional thinking that Panetti has been observed to exhibit. See Douglas Mossman, Atkins v. Virginia: A Psychiatric Can of Worms, 33 N.M. L. Rev. 255, 280 (2003); APA Br. 8 (noting that "[d]elusional thinking is a hallmark symptom of schizophrenia" (citing DSM-IV-TR 299-301, 312)).[20] Accordingly, Panetti's "rational understanding" requirement would be applied to a population that is, in significant part, delusional – and thus necessarily *irrational*. See APA Br. 9, n.11.

This situation contrasts sharply with the factual backdrop of *Atkins*. There, the Court quoted expert testimony that "[m]ental retardation is a relatively rare thing. It's about one percent of the population." 536 U.S., at 309, n.5 (quotation marks omitted). Here, the potential population is much larger, and the introduction of Panetti's ill-defined

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[20] Indeed, one death-row study of a limited population noted that half of the profiled inmates exhibited delusional tendencies, which included persecutory delusions (*e.g.*, inmate's belief that he was target of a Jewish conspiracy). Barbara A. Ward, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 39-40 & n.26 (1986) (citing Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Am. J. Psychiatry 393, 393 (1962)). Other inmates in the study coped with their predicament through obsessive rumination, "thinking furiously about other things, such as appeals, religion, or philosophy." *Ibid.*

– and inherently indefinite – "rational understanding" component would render the execution-competence standard substantially overinclusive. See Mossman, *supra*, at 289 ("Given the high rate of serious mental illness among homicide defendants, granting psychiatric exemptions could leave very few individuals eligible for the death penalty.").

Nor is this potential for exempting vast numbers of convicted murderers from execution an unintended consequence of Panetti's and his *amici*'s proposed test. Indeed, *amicus* APA is nothing if not candid, explaining that both its own position and the ABA's is that "an individual who is found incompetent to face the death penalty" should not have his sentence "merely suspended," but should "have his sentence *permanently commuted* to a non-capital punishment." APA Br. 17, n.15 (emphasis added). Thus, the conceded objective of these *amici* (and the predictable consequence of their proposed test) is not simply avoiding the inhumanity of executing a person who is truly insane, but rather removing from death row as large a class of capital convicts as reasonably possible.[21]

3. To prevent manipulation of the test, execution competence should turn on cognitive capacity, not on professed beliefs.

In general, "the focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings." *Godinez*,

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[21] The objective sought by these *amici* is in keeping with their stated public policy position – that there should be a national moratorium on all executions. See Am. Bar Ass'n, Report with Recommendations No. 107, Feb. 1997, *available at* http://www.abanet.org/irr/rec107.html (last visited Mar. 27, 2007); Am. Psychiatry Ass'n, Moratorium on Capital Punishment in the U.S.: Position Statement, Oct. 2000, *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200006.pdf (last visited Mar. 27, 2007); Am. Psychological Ass'n, The Death Penalty in the U.S., Aug. 2001, *available at* http://www.apa.org/pi/deathpenalty.html (last visited Mar. 27, 2007).

509 U.S., at 401, n.12; *Drope*, 420 U.S., at 171 (articulating a capacity-based test for competence to stand trial). The execution-competence standards that Panetti and his *amici* propose are at times appropriately phrased in terms of capacity. See, *e.g.*, Panetti Br. 29-30, 38, 39, 40 & n.24, 41, 44, 45, 47; APA Br. 6, 16; ABA Br. 4, 5, 7, A-1, B-1. But, at other times, their arguments focus instead on their characterizations of what Panetti *actually* believes. See, *e.g.*, Panetti Br. 22, 27-29, 31-32, 40, 45; APA Br. 3-4, 6-8, 12-13; ABA Br. 7-8.[22]

But any execution-competence standard *not* phrased in terms of capacity would be readily susceptible to circumvention by lies or noncooperation. There are undoubtedly numerous capital convicts who, though mentally ill, are capable of reading and understanding this Court's decisions – or, at the least, understanding their lawyers' explanations of those decisions. If the Court announces an execution-competence test that is not phrased in terms of cognitive capacity, any such convict would have considerable incentive to attempt to avoid execution by "incorrectly" answering (or refusing to answer) any relevant question about his impending fate.[23]

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[22] As much as cognitive capacity should be a part of any execution-competence test that the Court adopts, the "significantly impairs" qualifier that *amici* propose, APA Br. 3, 16; ABA Br. 5, should not. Notably, *amici* offer no defense of this ambiguous qualifier. Indeed, despite the appearance of the phrase in their proposed tests, *amici* at other times appear to support a pure capacity analysis. See, *e.g.*, APA Br. 11-12; ABA Br. 7-8. In any event, given the conflicting diagnoses and subjectivity inherent in mental-illness determinations, "significantly impairs" is no more definite than "rationally understands."

[23] The sample interview questions that the APA offers, APA Br. 18 ("Why have you been sentenced to death?"; "Will you be executed?"), illustrate the problem. Assuming that these questions would strike at the core of the execution-competence test that the Court adopts, and further assuming that capacity were not the test's linchpin, a convict whose mental illness does not affect the relevant aspects of his cognitive capacity could nevertheless escape execution through deliberate misstatements. Perhaps for this reason, in this passage of its brief, the

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4. Application of the State's proposed test will advance the modern penological interests behind the death penalty.

The Court has recently confirmed that retribution and deterrence are capital punishment's two predominant social purposes. *Roper*, 543 U.S., at 571 (citing *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); accord *Atkins*, 536 U.S., at 318-19. As shown below, application of the State's proposed test will advance each of those interests.[24]

a. The State's test will further the retributive purpose of punishment.

Retribution aims either "to express the community's moral outrage or . . . to right the balance for the wrong to the victim." *Roper*, 543 U.S., at 571; see *Atkins*, 536 U.S., at 319 (explaining that retribution is "the interest in seeing that the offender gets his 'just deserts' "). The Court has repeatedly emphasized the societal focus of retribution. See, *e.g.*, *Thompson* v. *Oklahoma*, 487 U.S. 815, 836 (1988); see also *Schriro* v. *Summerlin*, 542 U.S. 348, 360 (2004) (Breyer, J., dissenting); *Gregg*, 428 U.S., at 183-84 (joint opinion of Stewart, Powell, and Stevens, JJ.). Panetti misunderstands the societal nature of retribution, erroneously equating it with vengeance. Panetti Br. 46 & n.33. In fact, retribution is the legitimate penological interest that helps *prevent* vengeance. *Tison* v. *Arizona*, 481 U.S. 137, 181 & n.19 (1987) (Brennan, J., dissenting) (explaining that the Eighth Amendment channels impermissible private vengeance into constitutionally permissible retribution); see also *Gregg*, 428 U.S., at 183 (joint

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APA acknowledges that the interviewer's focus should be the convict's "mental capacities," rather than his mere professed beliefs. *Ibid.*

[24] It will also further the penological interest in incapacitation. See *Atkins*, 536 U.S., at 350 (Scalia, J., dissenting) (quoting *Gregg*, 428 U.S., at 183, n.28) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *Spaziano* v. *Florida*, 468 U.S. 447, 461-62 (1984).

opinion of Stewart, Powell, and Stevens, JJ.) (noting that the retributive "function . . . is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs").

i. The retributive justification for punishment necessarily precedes any execution-competence analysis.

The viability of retribution as a permissible theory of punishment depends not on the "rational understanding" that a convict may or may not have, see *supra* Part II.C.2; cf. Panetti Br. 46, but rather on the convict's moral culpability at the time he committed his crime, *Enmund* v. *Florida*, 458 U.S. 782, 800-01 (1982) (reflecting that "personal responsibility and moral guilt" define a criminal's level of culpability and concluding that execution of one convict for murders that he did not personally commit failed to serve the retributive goal of punishment).

Roper and *Atkins* illustrate this point. In those cases, the Court's decisions turned on its conclusions that members of specific classes of criminals lack sufficient moral culpability at the time of their crimes to be sentenced to death. *Roper*, 543 U.S., at 556, 571 (stating the issue as whether the Constitution permits execution of a criminal "younger than 18 when he committed a capital crime" and concluding that retribution is not served by imposing the death penalty on those "whose culpability or blameworthiness is diminished[ ] to a substantial degree"); *Atkins*, 536 U.S., at 319 (weighing the retributive value of the death penalty in light of "the lesser culpability of the mentally retarded offender"). If *Roper* had looked instead to the status of the criminal at the time of trial, conviction, or sentencing, its holding would not have forbidden his execution. *Roper*, 543 U.S., at 556 (noting that, at the time of his conviction and sentencing, the defendant had turned 18).

In contrast to the proportionality concerns addressed in *Roper* and *Atkins*, in the present context the question of culpability will already have been conclusively – and affirmatively – resolved. The issue is not whether the

Constitution permits society to *impose* the death penalty on a criminal who was, for some reason, less culpable at the time of his crime, cf. *Roper*, 543 U.S., at 556, 578; *Atkins*, 536 U.S., at 306-08, 321, but rather whether an unquestionably valid death sentence may be *carried out* against a criminal who has subsequently become mentally ill, see *Ford*, 477 U.S., at 425 (Powell, J., concurring in the judgment). This is so because any convict to whom the execution-competence test is applied will necessarily have been adjudicated both sane at the time of his offense and competent to stand trial, removing any doubts about culpability that might in some cases arise from mental illness.

ii. There are substantial problems with the wholly personal view of retribution that Panetti advances.

In addition to its predominate societal focus, the retributive rationale has a secondary concern for capital convicts' awareness of what the death sentence means and why it is being imposed. See *Ford*, 477 U.S., at 409; *id.*, at 422 (Powell, J., concurring in the judgment). Panetti, however, misunderstands both the scope and the prominence of this secondary retributive interest.

Relying heavily on nonjudicial sources, Panetti asserts that retribution requires a condemned prisoner to have a subjective appreciation of the moral impropriety of his criminal conduct and to "suffer the anguish" of knowing the reason for his fate. Panetti Br. 45; see also APA Br. 15 (centering the APA's retribution argument on convicts' "thinking about their forthcoming execution[s]" and whether they have "more than a shallow understanding of why they are being executed" (quotation marks omitted); ABA Br. 6, 8 (supporting a proposed requirement that capital convicts have "a deeper understanding of the state's justifying purpose" of punishment and asserting that a capital convict should "have the capacity to accept responsibility for his crimes" (quotation marks omitted)).

Putting aside its lack of support in case law, there are significant problems with Panetti's mind-of-the-criminal approach. First, tailoring the execution-competence test to the innermost thoughts of capital convicts would present substantial practical problems. It is difficult to imagine how anyone other than the convict himself could accurately assess whether he truly appreciates the magnitude of his moral wrong – at least with respect to a convict who is willing to lie about such things. And under Panetti's proposed test, it would be remarkably easy for a convict to feign his way out of a death sentence.

Second, allowing the execution-competence test to be shaped primarily by a personal, subjective view of the retributive rationale would prevent the execution of convicts who genuinely lack moral qualms about their crimes. It cannot be that amoral capital convicts should be excused from death sentences based on amorality alone. Yet Panetti's proposed standard would yield that result.

b. Adoption of the State's standard will effectively deter would-be murderers.

Deterrence is another legitimate basis for punishment distinct from retribution. See *Atkins*, 536 U.S., at 319; *Roper*, 543 U.S., at 571. It embodies society's interest in preventing future criminal acts. *Ibid.* Historically, the deterrent effect of capital punishment has been a matter of substantial debate. See *Gregg*, 428 U.S., at 184-85 (joint opinion of Stewart, Powell, and Stevens, JJ.). The most recent – and most methodologically advanced – scholarship, however, reflects a growing consensus among economics scholars that imposition of the death penalty substantially deters capital murder.[25] See Panetti Br. 47

[25] See, *e.g.*, Dale O. Cloninger & Roberto Marchesini, Execution Moratoriums, Commutations and Deterrence: The Case of Illinois, 38 Applied Econ. 967, 971 (2006); Paul R. Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 189-90 (2004); Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from

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(acknowledging "the deterrent effect of the death penalty"); see also Legal Historians Br. 25 (noting that "[d]eterrence was a key rationale for the death penalty at common law").

Necessarily, the question of execution competence will arise only in proceedings founded on valid convictions, and valid convictions depend on criminals' sanity at the time of the crime, *Clark*, 126 S.Ct., at 2718-21; ALI, Model Penal Code §4.01(1). Assuming he is neither underage nor mentally retarded, any sane prospective criminal can be expected to fully appreciate the possibility that he could be put to death for committing capital murder. In *Roper* and *Atkins*, a prospective criminal in the same class as the defendant would either be mentally retarded or under eighteen years of age at the time of the prospective crime – and thus arguably unable to appreciate the force of the death penalty's deterrent effect. *Roper*, 543 U.S., at 571-72; *Atkins*, 536 U.S., at 319-20. By contrast, a prospective criminal who is legally sane at the time he commits capital murder has no such excuse. He is fully capable of "premeditation and deliberation" – and, therefore, fully susceptible to the death penalty's deterrent effect. *Enmund*, 458 U.S., at 799 (quotation marks omitted).

Moreover, the deterrent effect of execution will not be measurably lessened by a prospective criminal's unfounded speculation that he might become incompetent after sentencing. See Panetti Br. 47 (agreeing that a prospective capital murderer would not foresee losing his competence to be executed sometime after he commits his crime). But, were Panetti's standard to be adopted, the increased likelihood of avoiding the death penalty through malingering or manipulating psychological examiners might well reduce the fears of prospective murderers and,

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Postmoratorium Panel Data, 5 Am. Law & Econ. Rev. 344, 372-73 (2003); H. Naci Mocan & R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453, 473-74 (2003).

as a result, unjustifiably reduce the death penalty's deterrent force. Cf. *Skipper* v. *South Carolina*, 476 U.S. 1, 14 & n.2 (1986) (Powell, J., concurring in the judgment).[26]

D. Under Both the State's Proposed Test and the Test That the Court of Appeals Applied, Panetti Is Competent To Be Executed.

In evaluating Panetti's competence to be executed, the court of appeals – like all of the other courts of appeals that have faced this issue[27] – applied its interpretation of the execution-competence test articulated by Justice Powell in his *Ford* concurrence. It asked whether the evidence showed Panetti to be "unaware of the punishment [he is] about to suffer and why [he is] to suffer it," JA 379 (quoting *Ford*, 477 U.S., at 422 (Powell, J., concurring in the judgment)), and appropriately rejected Panetti's argument for inclusion of a "rational understanding" component, *id.*, at 384; see *supra* Part II.C.2.

Under the State's proposed test, Panetti could properly be held incompetent to be executed only if, because of mental illness, he lacked the capacity to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death. To the extent this test varies from that applied by the court of appeals, any such variances are immaterial to the result because,

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[26] Indeed, adoption of the APA's and ABA's proposed standard – whereby the sentences of convicts lacking "rational understanding" would be permanently commuted to non-capital sentences, APA Br. 17, n.15 – would provide a predictable ex ante roadmap for a would-be murderer currently on medication for mental illness. If that murderer were to commit his crime, be convicted, and be sentenced to death, he could simply intend to go off his medication and lose rationality for a time, thus avoiding the death penalty permanently. For such an individual, the deterrent effect of capital punishment would, at the very least, be substantially diminished.

[27] *Walton* v. *Johnson*, 440 F.3d 160, 173 (CA4 2006); *Scott* v. *Mitchell*, 250 F.3d 1011, 1014 (CA6 2001); *Massie* v. *Woodford*, 244 F.3d 1192, 1195 & n.1 (CA9 2001); *Rector* v. *Clark*, 923 F.2d 570, 572 (CA8 1991).

as shown below, the record establishes that Panetti is competent to be executed under either standard.

First of all, it is undisputed that Panetti has the capacity to recognize that the punishment he faces is death. Indeed, the experts all agreed and the district court expressly found that, as a factual matter, "Panetti is aware he is to be executed," JA 363, 372; accord JA 373. Panetti did not oppose this conclusion in the district court, see JA 367, 372, did not challenge it in the court of appeals, and does not challenge it here. Therefore, Panetti is unquestionably "[]aware of the punishment [he is] about to suffer," JA 379 (quoting *Ford*, 477 U.S., at 422 (Powell, J., concurring in the judgment)) – a finding that, in reflecting Panetti's actual *demonstration of* his capacity to recognize that his punishment will cause his death, goes beyond the capacity that the State's test requires.

The only question that remains is whether Panetti has the capacity to recognize that his punishment is the result of his being convicted of capital murder, or, under the court of appeals's analysis, whether he is aware of why he is to be executed, JA 379. The record establishes that Panetti passes each of these prongs as well.

Dr. Parker and Dr. Anderson each testified that Panetti has the capacity to understand that he is being executed for the murders of which he was convicted. JA 245, 247 (testimony of Dr. Parker), 303-04 (testimony of Dr. Anderson); accord JA 75 (joint report of Drs. Parker and Anderson), and the district court explicitly concluded that "[t]here is evidence in the record to support a finding that Panetti is *capable* of understanding the reason for his execution," JA 367. Again, Panetti does not challenge this conclusion. And under the State's proposed test, it is irrelevant that these witnesses "were unable to reach a formal conclusion that [Panetti] did, in fact, understand" the reason for his execution. JA 364. For the reasons already noted, it is the *capacity* to understand – rather than actual demonstration of understanding – that defines the minimal level of competence needed to satisfy this prong of the State's proposed test. See *supra* Part II.C.3.

And with respect to the court of appeals's test, the district court accurately noted that two of Panetti's own execution-competence experts testified that, "despite his delusions, Panetti understands [that] the State's stated reason for seeking his execution is for his murders." JA 366; see also JA 157 (testimony of Dr. Conroy); JA 214 (testimony of Dr. Rosin). Thus, not only did the district court explicitly find that "Panetti is aware he committed the murders that serve as the basis for his execution," JA 372, but the court further found that "Panetti understands the State's stated reason for executing him is that he committed two murders," JA 372.

The district court also correctly concluded that the alternative sense of "understand" embodied in Panetti's proposal did not match the court of appeals's standard. JA 369 (noting that the court of appeals's test does not require the type of "rational understanding" that Panetti purports to distill from Justice Powell's *Ford* concurrence); JA 373 (noting that a capital convict's delusional beliefs "do not bear on the question of whether [he] knows the reason for his execution for the purposes of the Eighth Amendment" (quotation marks omitted)).

In sum, the record establishes that Panetti: (1) has the capacity to recognize that his punishment will cause his death (and does in fact does recognize this); and (2) has the capacity to recognize that his punishment is the result of his being convicted of capital murder (or, within the meaning of the court of appeals's test, is aware of why he is to be executed). Taken together, these facts conclusively establish Panetti's competence to be executed under both the court of appeals's test and the State's proposed test.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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